THE ANTI-TRUST ACT AND THE MERGER CASE.

THE constitutionality of the Anti-Trust Act is based upon the grant to Congress of power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." It was settled, before the case of the Northern Securities Company arose, that the power thus granted includes power to prohibit such acts as would obstruct the avenues of interstate commerce or interfere with its freedom.[1] The Anti-Trust Act declares to be illegal "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." In the case of the Northern Securities Company,[2] therefore, the government had but two facts to establish, namely, (1) that there was a contract, combination, or conspiracy; and (2) that this contract, combination, or conspiracy was "in restraint of trade or commerce" within the meaning of the Act, and, if carried out, would cause such an obstruction of commerce or interference with its freedom as Congress could prohibit.

All the judges of the Supreme Court appear to have reached the conclusion that the evidence showed the existence of some contract or combination, though they differed upon the question whether this contract or combination was in restraint of interstate commerce, within the meaning of the Act, and also upon the question whether the Act, as construed by the majority of the court, was constitutional. The precise character of the contract or combination found by the court to exist was not clearly defined in the opinions. The majority of the judges appear to have proceeded on the assumption that the combination was formed by the principal shareholders of the Northern Pacific Company and of the Great Northern Company prior to the formation of the Northern Securities Company, and that the formation of the Northern

[1] *In re* Debs, 158 U. S. 564; Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211, see pp. 227, 230.

[2] Northern Securities Co. *v.* U. S., 193 U. S. 197.

Securities Company was merely a means of carrying out this antecedent combination or arrangement.

It is difficult to base the decision on this ground. If there was a combination among the principal shareholders of the two railroad companies prior to the organization of the Northern Securities Company, that combination had ceased to exist at the time of the commencement of the suit. The purposes of the Northern Securities Company, expressed in its certificate of incorporation, were entirely lawful, and the corporation was legally organized under the laws of New Jersey. It is clear that the mere motives of some, or of all of those forming the corporation were not material. New parties, who had no connection with the original combination, had become shareholders in the Northern Securities Company. Very grave difficulties would result if the principle were now established that a corporation may be held responsible for antecedent acts or combinations of those who caused the corporation to be organized, or who subsequently became its principal shareholders.

However, it is clear that a corporation, in fact, is a combination of its shareholders. A partnership or unincorporated joint-stock company is a combination of individuals, as partners, for the purposes and upon the terms set forth in a partnership contract; and an incorporated joint-stock company, or corporation aggregate formed for business purposes, is a combination of individuals, as shareholders, for the purposes and upon the terms set forth in a charter or articles of incorporation. The Supreme Court, therefore, might properly have held that any joint-stock company, whether technically a corporation or not, is a continuing "combination in the form of a trust or otherwise," within the meaning of the Act, without passing upon the question whether the word "trust" was used in the Act in its technical sense, or in the sense which it had acquired by popular use at the time of the passage of the Act. Although the Northern Securities Company was lawfully organized, and at the time of its organization was not a combination in restraint of commerce (whatever the expectations or motives of those forming the company may have been), yet, if the subsequent acquisition of a controlling interest in the stocks of the two railroad companies operated as a restraint of interstate commerce, such acquisition may have made the combination become an illegal combination under the Anti-Trust Act. Similarly, a partnership originally formed for a lawful business may become an

unlawful combination by subsequently engaging in an unlawful business. The conclusion that an unlawful combination existed, therefore, should be based upon the ground that the Northern Securities Company, by acquiring control of the stocks of the two railroad companies, made itself an illegal combination, though previously it was a lawful combination.

Assuming that a combination existed, the question remains whether this combination was "in restraint of trade or commerce among the several States, or with foreign nations," within the meaning of the Act of Congress. A majority of the judges of the Supreme Court held that the combination was in restraint of interstate commerce, because its direct effect was to destroy the possibility of real competition between two railway lines that were important arteries of interstate commerce. Mr. Justice Holmes, with whom concurred three of the justices, appears to have held that the Act applied only to such contracts and combinations as were illegal at common law, and that these consisted only of the following two classes, viz.: (1) contracts with a stranger to the contractor's business (although in some cases carrying on a similar one) which wholly or partially restricted the freedom of the contractor himself in carrying on his own business, and (2) combinations or conspiracies to keep strangers to the agreement out of business. He also held that a partnership, or combination, which merely suppressed competition among those becoming parties to the partnership, or combination, by creating a community of interest among them, was not illegal at common law and was not prohibited by the Anti-Trust Act.

Having regard to the broad language of the Act, and to the fact that the Act undoubtedly was designed to remedy certain evils supposed to result from the formation of the large combinations of capital which at the time of the passage of the Act were revolutionizing the business world, it may be affirmed with confidence that Congress did not intend to use the words "in restraint of trade or commerce" in a narrow and technical sense, and to prohibit only such contracts and combinations in restraint of trade or commerce as were illegal at common law. The reasonable presumption is that Congress intended the Act to mean all that its language fairly expressed, and to prohibit every contract or combination that, in fact, operated as a restraint of interstate commerce, — so far as Congress had constitutional power to prohibit the same.

The precise limit of the power of Congress to make laws for carrying into execution the broad powers expressly delegated to Congress, cannot be determined by the application of technical or definite rules. The question often can be solved only by considering the true spirit and purpose of the Constitution and the practical results of the legislation in question. Moreover, no provision of the Constitution can be construed without reference to other provisions. Thus, the provision that no person shall be deprived of life, liberty, or property without due process of law must be deemed limited by the express grant to Congress of power to deal with certain specified subjects, including the power to regulate commerce; but the freedom of individuals to act, contract, and dispose of their property cannot be interfered with, except by legislation that fairly can be considered an exercise of some power expressly granted. The power to regulate interstate commerce was given to Congress for the purpose of securing to all the people of the United States free and unobstructed interstate commerce, without interference by legislation of the several states, and governed only by such regulations as Congress might see fit to impose. Congress may prescribe rules to govern the transaction of interstate commerce. Congress may exercise the police power over interstate commerce by prohibiting the transaction of interstate commerce that would be injurious to the health, morals, or peace of the community.[1] Congress, also, may preserve and protect interstate commerce by prohibiting acts that would operate as restrictions of the freedom of carrying on interstate commerce upon navigable waters, railways, or other avenues of interstate commerce. But it was not the purpose of the Constitution to take away from the states and to confer upon Congress power to enact all laws relating in any way to any matter connected with interstate commerce. A law is not a regulation of commerce among the several states, within the meaning of the Constitution, unless it regulates some subject that is connected with interstate commerce directly, or proximately, and not merely remotely; nor unless it regulates this subject in some particular bearing a direct relation to interstate commerce; nor unless it can fairly be said, upon considering the whole scope of the law, that it is a regulation of interstate commerce, and not a regulation of some other subject which Congress was not empowered to regulate.

[1] See Lottery Case, 188 U. S. 321.

Thus, to quote the illustration used by Mr. Justice Holmes in the case of the Northern Securities Company: "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." Railroads are directly connected with interstate commerce and, in fact, are instruments of interstate commerce; but that would not take away from the states and confer upon Congress the power to regulate the ownership of railroads, or their contracts and other dealings, except in direct relation to the transaction of interstate commerce. Partnerships or corporations engaged in interstate commerce, and contracts for the sale of property to be shipped into other states, are connected directly with interstate commerce; but Congress could not, on that ground, undertake to regulate such partnerships, corporations, and contracts, except in their direct relations to interstate commerce. Again, a law prescribing hours of work, or fixing the rate of wages of persons employed in the transaction of interstate commerce, would relate to a matter connected directly with interstate commerce; but such a law could not fairly be called a regulation of interstate commerce, because this obviously would not be its real and primary effect and purpose.

The Constitution does not, in terms, confer upon Congress power to prohibit either restraints of interstate commerce, or restraints of competition in interstate commerce. The Anti-Trust Act, in terms, prohibits contracts, combinations, and conspiracies in restraint of interstate trade or commerce, but does not, in terms, prohibit contracts, combinations, or conspiracies in restraint of competition. A contract or combination in restraint of competition would not be prohibited by the Act unless it be "in restraint of trade or commerce among the several states, or with foreign nations," and the prohibition must be limited to such obstructions of commerce, or interferences with its freedom, as Congress could constitutionally prohibit. Certain classes of contracts and combinations limiting competition have always been incidental to the transaction of trade and commerce according to business customs, and have never been regarded as restraints of trade or commerce. A law prohibiting such contracts and combinations would itself operate as a restraint upon commerce. It seems fair, therefore, to assume that Congress had not the intention, even if it had the power, to prohibit contracts and combinations of this character. As stated by Mr. Justice Brewer in the case of the Northern Securities Company: "Congress did not intend to reach and destroy

those minor contracts in partial restraint of trade which the long course of decisions at common-law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts that were in direct restraint of trade, unreasonable and against public policy."

In U. S. *v.* E. C. Knight Co.[1] the Supreme Court decided that the acquisition by the American Sugar Refining Company of the stock of four other sugar refining companies, was not in violation of the Anti-Trust Act, although the several companies had been shipping their products to other states and foreign countries, and the purchase gave to the American Sugar Refining Company a practical monopoly of the business of selling sugar in the United States. This decision was clearly right. The court appears to have based its conclusion principally on the ground that the contract or combination complained of related only to the acquisition of certain sugar refineries and did not constitute a *direct* restraint of interstate commerce. A better ground for the decision would seem to be that a contract or combination among manufacturers or shippers of an article to suppress competition among themselves is not such an obstruction of interstate commerce or interference with it as Congress can constitutionally prohibit. It was undoubtedly the purpose and the effect of the contract or combination in this case to suppress competition in the sale and shipment of refined sugar throughout the United States, and if that, in fact, was such an obstruction of interstate commerce as Congress could constitutionally prohibit, the fact that there was no express contract to cause this obstruction, and that it was effected indirectly, is hardly a sufficient ground for holding that Congress was powerless to prevent it.

In the cases of the Trans-Missouri Freight Association[2] and of the Joint Traffic Association,[3] the Supreme Court held that a contract or combination among several railroad companies for fixing their rates upon competitive interstate business, was directly in restraint of interstate commerce and was rendered illegal by the Anti-Trust Act. Congress undoubtedly had constitutional power to prohibit contracts or combinations obstructing or unreasonably interfering with the transaction, by the public, of interstate commerce upon railways or other highways, whether the obstruction

[1] 156 U. S. 1. [2] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290.
[3] U. S. *v.* Joint Traffic Association, 171 U. S. 505.

or interference be effected by physical force, or by the refusal of the railway companies to permit interstate shipments, or by the imposition of more than reasonable rates therefor. It was argued in these cases that, while the contracts complained of may have restricted competition, they did not impose unreasonable rates, and therefore were not in restraint of commerce; but a majority of the court held that every restraint of competition among railroad companies would to some extent restrain commerce, and that the courts cannot inquire into the reasonableness of any restraint. It is, no doubt, true that the courts cannot inquire into the wisdom or desirability of an actual obstruction or restraint of commerce prohibited by Congress; but if a contract or combination among railroad carriers does not affect interstate commerce except by restricting competition, the question whether such restriction of competition is reasonable or unreasonable would be material for the purpose of determining whether it did in truth operate as an obstruction or restraint of commerce. Some contracts of railroad companies in restraint of competition may obstruct interstate commerce, but that would not be true in fact of a contract to maintain rates that are reasonable.[1]

In the case of the Addyston Pipe Company[2] the Supreme Court took a long step further when it held that a contract among manufacturers of iron pipe restricting competition among them in the sale of their product was such an interference with interstate commerce as Congress could prohibit. The contract in this case did not in any degree obstruct or hinder the public in carrying on interstate commerce; its effect, at most, was to restrain certain pipe manufacturers, who were parties to the contract, in the shipment of their pipe into other states. Congress cannot compel individuals to engage in interstate commerce or to compete in interstate commerce; and a contract among individual shippers not to compete among themselves would not obstruct or hinder the public in carrying on commerce. A law prohibiting such a contract would not be a measure to regulate the interstate commerce of the people generally, or to keep the channels of interstate

[1] Upon this point see opinion of the court in the Trans-Missouri Freight Association case, 166 U. S. p. 339, and in the Joint Traffic Association case, 171 U. S. p. 575. The right of railway companies to charge reasonable rates upon interstate traffic was, of course, conceded in these cases. See also Hopkins *v.* U. S., 171 U. S. 578, pp. 592–594.

[2] Addyston Pipe, etc., Co. *v.* U. S., 175 U. S. 211.

commerce unobstructed and free from restraint, subject only to regulations imposed by Congress. It would really be a measure to secure to consumers the benefit of lower prices through competition.

In Montague *v.* Lowry [1] the Supreme Court held that the Anti-Trust Act rendered illegal a contract or combination among certain dealers in tiles in California and manufacturers of tiles in Eastern states, whereby the manufacturers were prohibited from selling tiles to any dealers in California who were not members of the combination. It will be observed that in this case the contract or combination did not merely restrain the Eastern manufacturers from competing among themselves, as in the case of the Addyston Pipe Company, but it prevented all dealers in California, except those who were parties to the combination, from purchasing tiles from the Eastern manufacturers. It could be said, therefore, that the effect of the combination was to hinder or restrain the public generally in the transaction of interstate commerce.

In the case of the Northern Securities Company the precise question was whether a combination to acquire and hold a majority of the stocks of two railroad companies, the lines of which constituted main arteries of interstate commerce, and to create a community of interest in their ownership, was in restraint of commerce within the meaning of the Anti-Trust Act and could be prohibited by Congress. The ultimate effect of the combination in this case, undoubtedly, was to destroy the possibility of true competition between the owners of the two railroad properties, because the combination (*i. e.*, the Northern Securities Company) became the principal owner of both properties and acquired full control over their management. If, as decided in previous cases, a contract or combination suppressing competition between railroad companies in respect of interstate commerce is in restraint of interstate commerce and illegal under the Act, the majority of the court were right in holding that the combination in the case of the Northern Securities Company was illegal. In the prior cases the restraint of competition was only partial, while in this case the possibility of true competition was destroyed. The case, however, cannot fairly be distinguished from the case of E. C. Knight Company on the ground that the restraint of commerce in the one case was direct and in the other case indirect. The true distinction

[1] 193 U. S. 38.

is that in the one case the combination restricted only competition between individual shippers and did not affect the public in the transaction of interstate commerce, while, in the other case, the combination imposed a restraint upon the transaction, by the public, of interstate commerce upon railroad lines, which Congress had power to keep open, at all times, as avenues of interstate commerce.

The Anti-Trust Act does not purport to prohibit acts in restraint of commerce performed under contracts or by combinations, but it prohibits the contracts or combinations themselves, if in restraint of commerce. It was, therefore, not necessary to show that any action was taken by the Northern Securities Company to advance rates or otherwise to hinder commerce upon the two railway lines. Assuming that a restraint of competition among interstate railway carriers is a restraint of commerce, as was held in the case of the Joint Traffic Association, a combination to acquire absolute power over competitive rates would, properly speaking, be "in restraint of commerce" though rates should not actually be advanced. Similarly, a government with autocratic powers would be said to be in restraint of liberty although it should be a benevolent autocracy and should not exercise its powers oppressively.

Mr. Justice White and the three justices who concurred in his opinion, appear to have assumed that the case of the government was based upon two propositions, viz.: (1) That the ownership of stock in two railroad corporations constituted interstate commerce if the railroad companies themselves were engaged in interstate commerce; and (2) that the authority of Congress to regulate interstate commerce embraced the power to regulate the ownership of property used in interstate commerce, including power to regulate the ownership of stock in corporations whenever such corporations were engaged in interstate commerce.[1]

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[1] Mr. Justice White used the following language:—

"The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a state is interstate commerce, wherever the railroads engage in interstate commerce. . . ."

"Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in State corporations, because such corporations may be in part engaged in interstate commerce?"

"But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary con-

The case of the government does not appear to have involved either one of these propositions, whatever may have been claimed in the arguments. The Anti-Trust Act prohibits only contracts, combinations, and conspiracies in restraint of commerce, and it does not purport to deal with the ownership of property in any respect. It is the act of contracting, combining, or conspiring in restraint of interstate commerce that is prohibited, and the relief sought by the government was not to regulate the ownership of property, but to restrain the continuance of a contract, combination, or conspiracy that operated in restraint of interstate commerce. While Congress was not vested by the constitution with power to regulate the ownership of stock in state corporations, or the ownership of any other property, merely because used in interstate commerce, Congress was empowered to prohibit obstructions and restraints of interstate commerce; and the power of Congress to prohibit persons from contracting, combining, or conspiring to obstruct or restrain interstate commerce would not fail merely because the contract, combination, or conspiracy was to be carried into effect through an acquisition of stock or other property.

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ceptions of rights of property. For it would follow if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated."

". . . in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce."

"In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce."